

January 10, 2011

Phil Isenberg, Chairman
Delta Stewardship Council
980 Ninth Street, Suite 1500
Sacramento, CA 95814

Dear Mr. Isenberg:

The East Bay Municipal Utility District (EBMUD) commends the Delta Stewardship Council (Council) for its progress in addressing crucial issues in the Delta, and appreciates this opportunity to share our views about priority areas for focus as you prepare the Delta Plan. We do not propose to comment on all the elements of the recently released Draft Delta Plan Outline, but will limit our comments to four main topics. The first concerns the challenges now facing the Bay Delta Conservation Plan (BDCP) regarding its incorporation into the Delta Plan. We would then like to follow with some detailed observations and recommendations about a Delta levee improvement strategy, financing the Delta Plan, and timing for the various Delta-related processes.

1. Adjusting Expectations of the BDCP as a Part of the Delta Plan

a. Critical Elements of the BDCP Remain Unresolved

After nearly five years and more than 120 meetings, the BDCP process has arrived at an impasse, unable to grapple with several core issues that must be resolved if success is to be achieved. Perhaps the most fundamental unresolved (and predominantly unaddressed) problem within the BDCP is achieving both water supply “assurances” and ecosystem restoration. In an effort to guarantee specific, numeric yields, specific operating criteria are being developed for possible inclusion in the BDCP. At the same time, specific ecosystem metrics, including biological goals and objectives, are being developed to help ensure a healthy ecosystem will be achieved and maintained. No meeting of the minds has been achieved on specific metrics and linkages to anticipated yield numbers over the past four and a half years of discussions within the Steering Committee.

The Council must move forward to adopt a Delta Plan within the timeframe established by statute, rather than waiting for the BDCP Steering Committee to complete its work. The Council’s Delta Plan must address what the BDCP has been unable to accomplish, including a comprehensive adaptive management strategy to actively respond to the complex and dynamic processes that shape the Delta. Given this highly complex system and a habitat conservation plan that federal agencies describe as having a “high degree of uncertainty,” assurances regarding water supply reliability should be conditional on specific, measurable biological goals and objectives within a functional adaptive management plan.

The Council should develop its own independent stance on adaptive management for the Delta Plan. With the assistance of the Independent Science Board, the Council should ensure that appropriate, measurable biological goals and objectives are established to guide restoration efforts in the Delta. Without a clear, comprehensive adaptive management plan and measurable goals and objectives, any water supply assurances will neither be durable nor reliable.

As the entity responsible for resolving appeals regarding the BDCP, the Council will ultimately benefit all parties if it has thoroughly examined adaptive management before considering the BDCP. Scientific certainty does not exist for potential Delta restoration measures, and a robust testing and evaluation or monitoring process must be instituted to determine the best means to achieve comprehensive and defensible goals and objectives.

For its part, EBMUD has primary responsibility for sustaining and enhancing the salmonid fisheries on the Mokelumne River, which is a tributary to the Delta. The fate of the Mokelumne River salmon and steelhead fisheries is linked to the water operations and ecosystem conditions within the Delta. Understanding the specifics of adaptive management in the Delta will better enable EBMUD to make appropriate decisions as it balances fishery needs and water supply demands on the Mokelumne River.

b. Update the Delta Water Quality Control Plan

The Council should urge the State Water Resources Control Board (SWRCB) to initiate an update of its Delta Water Quality Control Plan (WQCP) as soon as the SWRCB concludes its current proceedings on San Joaquin River flows. Such action by the SWRCB would also serve to guide the BDCP Steering Committee to complete its work within the parameters of the SWRCB's jurisdiction. The SWRCB has jurisdiction over the entire Delta and all its water users, and in this process other interests are invited to present evidence and testimony in SWRCB proceedings.

By contrast, the BDCP Steering Committee has no obligation to take testimony and evidence from those entities that do not serve on the Steering Committee. The Delta export water agencies that serve on the BDCP Steering Committee export only about seventeen percent of the Delta inflow. In a statewide context, the Delta exporters collectively deliver less than twenty percent of the water used across the state, a relatively small fraction of both the state's water interests and the Delta water interests. Water interests that represent only a minority of the affected parties cannot be the only ones that participate in crafting a solution to the problems facing the Delta. Fixing the Delta involves many parties that have a greater stake in the Delta than is held by the Delta exporters. As part of SWRCB proceedings on the Delta, all affected parties, across the state, would have standing to fully participate, present evidence, cross-examine other witnesses, and are afforded the right of full due process.

The SWRCB should conduct a comprehensive Delta proceeding, with flow determinations, and any needed adjustments to water rights. The SWRCB has an established process in which all parties are invited to present evidence and testimony, and engage in cross-examination, in the SWRCB proceedings. All parties must have the opportunity to provide input before the adoption and implementation of the BDCP.

Without minimizing the effort and cost involved, it is imperative that the flow determinations following from the updated WQCP be finalized and integrated with long-term investments in either conveyance or Delta restoration projects. Such information is crucial to ensure informed decisions about the sizing and operations of a new Delta conveyance, and to allocate responsibility for instream flow releases by Delta users.

The Council lacks the specialized expertise and resources to undertake the task of assessing flow needs in the Delta. By contrast, the SWRCB does have that authority and a proven quasi-adjudicatory process for putting them in place. The SWRCB has been long recognized as an impartial body that relies on evidence, on the record proceedings, notice to affected or interested parties, and ex parte rules for contact with Board members on adjudicative matters. The SWRCB should be encouraged to make the necessary public trust flow determinations and effectively implement them by revising and updating its Delta water quality control plan. Once these flow determinations have been made, EBMUD and many other water agencies will benefit from having clarified “ground rules” and a better basis for long-term planning.

To fulfill its charge of implementing the co-equal goals of water supply reliability and ecosystem protection, the Council must obtain balanced, scientifically-based, flow standards for the Delta. Only the SWRCB can provide that. Other Delta planning can proceed on a parallel track with the SWRCB efforts, but no long-term infrastructure decisions should be made until the quantity of water available for export is better understood and legally resolved.

c. Proceed Without Relying on BDCP

The Council has already demonstrated its commitment to meet its statutory deadline for completion of the Delta Plan. The draft Delta Plan Outline released on December 6th provides a comprehensive preview of a Plan that will meet the statutory requirements. In light of the uncertainties regarding when or whether the BDCP will be complete, or whether it will be approved as a Natural Community Conservation Plan (NCCP), it is appropriate for the Council to proceed on an independent course. We support the Council’s expressed intent to incorporate priority components of the BDCP into the Delta Plan, provided that they are sufficiently developed and broadly supported. Such an approach is more likely to produce a successful outcome than relying on the entire BDCP to complete its development and approval process in less than twelve months.

2. Delta Levee Improvements

As the Council begins to develop priorities for state investments in Delta levees as required by the Delta Reform Act (Sect. 85306), it should develop and maintain a database of information about the interests and assets protected by Delta levees. The Delta Risk Management Strategy carried out by the Department of Water Resources (DWR) is one source of information where an island-by-island inventory was presented. There are very likely other sources of information available to flesh out an initial draft database that should be subjected to public review and comment. General categories within this inventory should include: state interests (e.g. ecosystem, health and safety, recreation, transportation); federal interests (e.g. migratory birds, fish and wildlife, interstate power and transportation facilities, federal lands or facilities); and local interests (e.g. communities, water deliveries, farmland, industry and businesses).

Further, expenditures for levee improvements should be tracked on an annual basis to understand where federal, state, and local investments are being made. The comparison of annual expenditures to a comprehensive Delta-wide inventory of interests and assets should provide an initial view of what is being protected by spending decisions prior to adoption of a Delta Plan. This type of analysis is not being done by others, except on a limited academic basis (i.e. Public Policy Institute of California (PPIC) reports), and is clearly within the Council's realm of responsibility and jurisdiction. Council members have repeatedly referenced the need to prioritize Delta investments, but a prior, critical step is acquiring a good basis of information.

A categorization as to the existing state of the levees across the Delta is needed, recognizing that it will likely change over time as some improvements are made, some islands continue to subside, and all islands are subjected to continuing erosion, wave action, and tidal or hydraulic forces. The Council has already sharpened its focus on the right questions for prioritization, and a more definitive plan of action would help the Council to develop a sound analytical basis for prioritization decisions.

As the Council coordinates with other agencies charged with funding or carrying out levee improvements in the Delta (including DWR and the U.S. Army Corps of Engineers), a better understanding of the respective priorities of these agencies should emerge. One clear area of demarcation might be state and federally authorized levees, often called "project levees." While it might be generally useful to understand the status of project levees and flood control across the Central Valley, the more pressing need for the Council is to develop a comprehensive position with respect to "non-project" levees, which comprise the vast majority of levees within the Delta. The non-project levees were constructed long ago in an ad hoc manner and they protect a wide variety of interests as noted earlier. How the Council develops priorities and interacts with DWR's Delta levee programs will be an area that deserves regular and ongoing coordination to improve on the current implementation approach.

In developing an investment strategy, the Council may need to grapple with the concept of a “do not resuscitate list” as recommended in a PPIC report. Related issues include “converting” or “transitioning” some islands (or parts of islands) to ecosystem habitat, and how to prioritize expenditures for such ecosystem restoration. Just because a restoration project can be implemented on a given island does not mean it should be, unless it is a high priority in the larger ecosystem restoration plans for the Delta. There are many different aspects to levee investment decisions, and the Council is encouraged to start gathering information in weighing tradeoffs and priorities. Again, a panel of experts might provide valuable input on these important decisions.

As a direct stakeholder and financial investor in 51 miles of Delta levees, EBMUD strongly supports developing a coherent and sustainable levee plan. All Delta interests will benefit from a comprehensive analysis that supports a rational investment strategy for Delta levees.

3. Financing the Delta Plan

The Council has a significant opportunity to shape legislation on Delta finance that may be introduced in 2011 or 2012. The “beneficiary pays” principle should be reaffirmed as the most equitable basis for financing Delta improvements, whatever form those improvements ultimately take. To take steps toward this outcome, the Council should first resume the work already identified in its Interim Plan: “(1) beginning to develop accurate and complete information on current finances and (2) initiating discussion of long-term financing to support activities under the [Delta Reform] Act.”

Building on a recommendation in the Delta Vision Strategic Plan, EBMUD recommends that the Council adopt “a series of principles regarding design of financing” that could inform future legislation for Delta finance. Such principles should include:

- Establishing that beneficiary pays means allocating costs to individual entities, classes of entities, or the public in approximate proportion to benefits received by each from implementation of measures in the Delta Plan;
- Asserting that the mitigation of any adverse impacts to the Delta should be accomplished separately, as part of compliance with CEQA and any other permit conditions;
- Defining “public benefits” as distinct from those that accrue to specific entities or classes of entities;
- Imposing a cap on the total revenues that can be derived from the user fee(s) or other means of generating revenue, based on the legislatively approved annual budget for the Delta Plan;
- Including protections against the redirection of user fee revenues or other revenue sources to unrelated purposes;
- Creating guidelines for apportioning costs for projects with both private and public benefits; and

- Providing for an open, transparent public process that permits the presentation of evidence, on the record, to inform the design of a finance system for the Delta Plan.

EBMUD believes that when the beneficiary pays principle is put into practice, it should not result in a uniform fee imposed on all Delta users. By the same token, it is neither desirable nor feasible that every beneficiary should have a specifically tailored fee that reflects its particular situation. In the case of water users, we envision a set of four to six distinct categories for fees that is both fair and practical to implement.

To create a foundation for developing specific financing instruments, EBMUD recommends that the Council conduct a comprehensive inventory of all infrastructure and economic assets (e.g. highways and roads, pipelines, electric transmission lines, rail lines, homes, farmland, industry/businesses, etc.) in the Delta with particular attention to those that have a clear state interest. This inventory should also identify the full range of activities (agriculture, recreation, upstream and in-Delta water diversions) in which the state has an interest, and which should be supported by user fee revenues. Together, these lists should provide a preliminary basis for identifying all the beneficiaries that should be considered when designing a user fee system. This exercise will overlap in large part with the creation of the database of the interests and assets protected by Delta levees, described in the preceding section.

Absent a statutory framework, the Council has the latitude to explore a variety of approaches to financing the Delta Plan, either as a unified program or by applying different assessment methods for individual elements such as levee improvements. In fact, some complexity in the financing structure is inevitable, given that some programs such as the BDCP are planned to be financed by a mix of applicant funding and public funding. In addition, there are significant state interests in the Delta that should be considered public benefits, with a different source of financing than those benefits that accrue only to discrete entities or a subset of interests. Finally, the federal interests in the Delta should also be identified as part of a comprehensive assessment of the beneficiaries and their financial obligations.

The Council may wish to consider, for example, a benefit assessment district for levee improvements that adheres to the principles described above. Recognizing its own obligation to contribute to Delta levees, EBMUD supported SB 34 (Torlakson) in 2007, which proposed a benefit assessment district for this purpose. Instream flow studies conducted under the purview of the SWRCB will require significant funding, which might be collected via SWRCB fees on water rights or other user fees. By contrast, other elements of the Delta Plan including ecosystem restoration, the Council's administrative costs, and the science program may be viewed as a public benefit, which may require a broader funding base than programs with more defined beneficiaries.

Specifically regarding ecosystem restoration, EBMUD believes that it will be vital to conduct a transparent analysis for each major project to determine the proportions of each

that constitute mitigation for past and future Delta water export operations, those that mitigate for other activities, and actual enhancement that can be recognized as a public benefit. While not a simple exercise, making these distinctions is critical for those entities that might be subject to a broad-based user fee to finance public benefits, and that rightfully hope for a reasonable effort to avoid cross-subsidies.

The prospects for any fee system(s) will be subject to the final disposition of Proposition 26; therefore, the Council's efforts are best directed at this time to a preliminary examination and scoping of viable alternatives for sustainable funding of the Delta Plan. Any proposal that involves new fees on Delta interests will be controversial; however, the existing vacuum in Delta financing also carries a penalty on long-term planning. EBMUD is eager to assist the Council in developing a finance plan that reflects the principles outlined above.

4. Timing for Various Delta Processes

EBMUD recommends that the Council begin to sketch out the elements that will be known or complete by January 1, 2012, and those that will be available later to consider when to update or revise the Delta Plan as required by Section 85300(c). Since the Delta Plan will be finalized before several crucial efforts in the Delta are complete, the Plan should be structured to allow for key decisions or results to be incorporated after the adoption of the Plan. As an example, some general guidance on recommended flows for the ecosystem may be appropriate in the Delta Plan; however, detailed flow prescriptions and attendant responsibilities for those flows should only emanate from the SWRCB on the basis of quasi-adjudicative proceedings where all parties can present evidence that is carefully weighed by the Board.

While a final EIR/EIS for the BDCP may not be available by January 1, 2012, valuable information from preliminary studies and engineering work could be considered by the Council in that timeframe and supplemented by other input from stakeholders who are not part of the BDCP process. The Council provides the best forum to consider a broad cross section of input about the Delta's future, and some of the recommendations or actions in the Delta Plan should center on how to address competing interests or recommendations regarding conveyance, ecosystem restoration, economic sustainability, and other topics where divergent input is expected.

Regarding levees, the prioritization strategy for levee investments discussed above would involve several steps and ongoing inter-agency coordination. If that approach is pursued, the Council may be able to frame an action strategy or work plan by January 1, 2012, that includes future decisions on annual investment choices or recommendations as part of the state budget cycle. The levee investment strategy will also be part of a broader finance strategy for the Delta Plan with multiple components, each of which could be varying states of development by January 1, 2012. Adoption of basic principles as covered earlier is a recommended starting point for all parts of the finance plan.

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Thank you for considering these comments. If you have any questions, please call Rande Kanouse at (916) 443-6948. EBMUD looks forward to continued collaboration with the Council in developing a viable, broadly supported Delta Plan.

Sincerely,

A handwritten signature in cursive script, appearing to read "Dennis M. Diemer", followed by a long horizontal flourish.

Dennis M. Diemer
General Manager

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